Filed 12/5/13 P. v. Garvin CA4/2

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. TERRY LEE GARVIN, Defendant and Appellant.	E056467 (Super.Ct.No. FVA1200249) OPINION

APPEAL from the Superior Court of San Bernardino County. Arthur Harrison, Judge. Affirmed.

Kurt David Hermansen, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, A. Natasha Cortina, and Ronald A. Jakob, Deputy Attorneys General, for Plaintiff and Respondent.

I

INTRODUCTION

A jury convicted defendant Terry Lee Garvin of making criminal threats against his fiancée's sister, Latasha Smith, in violation of Penal Code section 422.[1] The court sentenced defendant to a prison term of two years.

Defendant, who represented himself below, raises multiple issues on appeal: violation of section 987; error in admitting other-crimes evidence and excluding evidence of defendant's acquittal on another offense; and error in responding to the jury's questions during deliberations. We conclude there was no prejudicial error and no cumulative error. We affirm the judgment.

II

STATEMENT OF FACTUAL AND PROCEDURAL BACKGROUND

A. Pretrial Proceedings

When defendant was initially arraigned on the complaint in February 2012, he executed a *Faretta*[2] waiver of his right to an attorney. In March 2012, defendant was arraigned on the information. The court advised him again on his right to be represented by a lawyer. In April 2012, after ongoing problems with defendant's self-representation, the court appointed an attorney as standby counsel for defendant. Before trial, the court again admonished defendant about the danger of representing himself and recommended

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[1] All further statutory references are to the Penal Code unless stated otherwise.

[2] *Faretta v. California* (1975) 422 U.S. 806.

that he accept representation by a lawyer. Defendant acknowledged that the possible penalty for making terrorist threats was 16 months, two years, or three years in prison but he insisted on representing himself.

The trial court granted the prosecution's pretrial motion to admit evidence of a threat defendant made on September 23, 2011, to Latasha Smith wherein he stated "I'm gonna kill you and your sister." The trial court overruled defendant's objection on the grounds that he had been acquitted of the charge and admitted the September threat as evidence of intent in the 2012 case. The court also excluded evidence of defendant's acquittal. (Evid. Code, § 1101, subd. (b).)

B. Trial Testimony

The trial was conducted in April 2012. The two sisters, Latoia and Latasha Smith, testified as reluctant witnesses about the earlier incident on September 23, 2011, and the charged incident on February 12, 2012.

Latoia testified that she was defendant's fiancée and she was pregnant on February 12, 2012. Latoia and defendant began arguing about the car they had recently purchased. Her sister, Latasha, and other family members were present. Latasha was also pregnant. Latoia was tired of arguing and wanted to leave so she asked to borrow her niece Shanija's phone. Latoia further testified that she did not remember most of the details about when the police had been called in September 2011 after defendant had stated, "I'm going to kill you and your sister," while holding a glass bottle in his hand.

On cross-examination, Latoia admitted defendant had struck her on the head with a beer bottle and she had hit him with an electronic charger in September 2011. But

Latoia denied that defendant had threatened Latasha or herself or that she was ever the victim of domestic violence. On February 11, 2012, the police had been called to the residence three times and they had advised Latoia and her sister to leave. Because she was upset, Latoia had pretended she had called someone to "jump" defendant. Defendant was the person who called the police on February 12, 2012.

Latasha testified that Latoia and defendant had been arguing about their car on February 12, 2012. Latasha did not remember many details about either the September or February incidents. She denied she was hit with a bottle in September. She recalled trying to intervene when her sister and defendant were arguing. Defendant did not threaten to kill her and her sister. On cross-examination, Latasha denied defendant had threatened to kill anyone on February 12, 2012.

Jacob Medina, a Rialto police officer, testified that he responded to a call from defendant about a domestic disturbance on February 12, 2012. When he arrived, defendant was pacing on the sidewalk and appeared violent. Latoia told him that she and defendant had argued about whether defendant's name would be on the title to the car. Defendant stated to her, "Fuck you all and your bastardized kids. I'll give the police a reason to come." Latoia saw defendant pacing up and down with a knife. Latasha quoted defendant saying, "I'll hurt everybody. . . . Fuck you. I'll kill you and your unborn child," after which he picked up a kitchen knife. Latasha believed defendant was capable

of his threat. Shanija told Medina she heard defendant say, "I'll kill all of you" and saw him pick up a knife.[3]

Another police officer, Travon Ricks, testified that, in September 2011, Latasha told him defendant had hit her with a beer bottle and threatened to kill her and her sister. Latoia said that, after arguing about sex, defendant threatened to kill her and her sister while holding a beer bottle. Officer Ricks photographed injuries to Latasha's neck and Latoia's knee.

III

SECTION 987

Defendant claims the trial court violated section 987, subdivision (a), by failing to readvise him of his right to counsel and obtaining a new waiver of his right to counsel at his arraignment on the information. Throughout the pretrial proceedings, the same trial judge repeatedly reminded and recommended to defendant that he should accept the appointment of legal representation. Not only does defendant concede that any error was harmless but we conclude there was no error.

A. Arraignment on the complaint

At defendant's initial arraignment in February 2012 on the felony complaint, the trial court advised defendant of his right to counsel and offered the assistance of counsel. Defendant requested self-representation. Defendant was fully advised of his right to an attorney, signed a written *Faretta* waiver, and elected to give up his right to counsel. The

[3] Shanija, who was in the sixth grade, testified at trial she could not remember anything.

court found defendant "knowingly, intelligently and voluntarily" gave up his right to counsel and granted his request for self-representation. The court also cautioned defendant, "If at any point in time you feel you're in over your head, and you want to have an attorney appointed, you let the judge know or let the D.A. know that you're dealing [with]." Defendant represented himself at the preliminary hearing.

B. Arraignment on the Information

Before defendant's arraignment on the information in March 2012 , the trial court stated: "Mr. Garvin, it looks like you are in pro per still. We'll continue those unless you have a change of heart." After arraignment defendant requested his right to have a 30 minute interview with Latoia based on his "pro per status." The trial court again advised defendant, "You have a right to a trial within 60 days of today. You have a right to be represented by a lawyer without cost if you're indigent and cannot afford counsel. You also have a right to represent yourself."

C. Pretrial Advisement

Before trial in April 2012, the court appointed stand-by counsel. The court explained: "I'm going to appoint an attorney to be a standby counsel to take over your defense, if that comes to be needed. There are two ways that can be needed; one, if you decide you're in over your head and you need an attorney to represent you. The other is if you're disruptive in court, I'll have counsel take over. And if you continued to be disruptive in court, you'll be excluded from the courtroom and then standby counsel will step in and represent you in your absence. Okay?" The court further told defendant, "You'll be welcome to represent yourself as long as you follow procedures that are

appropriate in court." At the next hearing, the court reminded defendant his pro per status would be terminated if he was disruptive and defendant indicated that he understood. Subsequently, the court told defendant: "Okay. You've been adamant from the very first day that you don't want an attorney to represent you. You understand what the risks and the exposures are in this case?" The court further stated: "At any point in time you feel you need an attorney to step in and represent you, you let me know that." During the pretrial motions, the court told defendant, "If you want an attorney to represent you, I will bring her in and let her represent you." Defendant declined.

D. Discussion

Section 987, subdivision (a), provides: "In a noncapital case, if the defendant appears for arraignment without counsel, he or she shall be informed by the court that it is his or her right to have counsel before being arraigned, and shall be asked if he or she desires the assistance of counsel. If he or she desires and is unable to employ counsel the court shall assign counsel to defend him or her." The superior court must give such an advisement "even when the defendant previously has been advised of the right to counsel and has expressed an intention to waive counsel throughout the proceedings." (*People v. Crayton* (2002) 28 Cal.4th 346, 361 (*Crayton*).)

As demonstrated, defendant was advised in conformity with section 987, subdivision (a), at the arraignment on the complaint and the information. After defendant executed a *Faretta* waiver for his arraignment on the complaint, the court subsequently informed defendant at the arraignment on the information that he had the right to be represented by counsel at no cost if he could not afford an attorney and that he could

continue to represent himself until or unless he had "a change of heart." Section 987, subdivision (a), does not mandate any particular verbiage or phrasing. Defendant was readvised of his right to counsel and asked about his desires regarding the assistance of an attorney as required by section 987, subdivision (a). (See, e.g., *People v. Hatch* (2000) 22 Cal.4th 260, 273 [no "'magic words'" required].)

The defendant in *Crayton*, upon which defendant relies, received no admonishment at all regarding the right to counsel at the superior court arraignment on the information. (*Crayton, supra*, 28 Cal.4th at p. 357.) Instead, the court encouraged defendant to proceed with self-representation. Unlike *Crayton*, there was no violation of section 987 in defendant's case.

Furthermore, any error was harmless. "Federal authority holds that once a defendant gives a valid waiver, it continues through the duration of the proceedings unless it is withdrawn or is limited to a particular phase of the case." (*Crayton, supra*, 28 Cal.4th at p. 362.) Thus, noncompliance with section 987, subdivision (a), is "not of federal constitutional magnitude" and the harmless error standard applies. (*Crayton*, at pp. 350, 364, citing *People v. Watson* (1956) 46 Cal.2d 818, 836.)

Defendant was repeatedly warned about the risks of self-representation and offered the assistance of counsel. Like the defendant in *Crayton*, defendant's "desire to represent himself was unwavering . . . ." (*Crayton, supra*, 28 Cal.4th at p. 366.) The record demonstrates that defendant "was aware of his right to appointed counsel at all stages of the proceedings and knowingly and voluntarily waived that right, insisting upon exercising his constitutional right to represent himself," and it is not reasonably probable

that any section 987 error "affected defendant's decision to represent himself . . . ." (*Crayton*, at p. 366.) Accordingly, any error was harmless.

IV

GRIFFIN[4] ERROR

The People agree with defendant's claim the trial court committed *Griffin* error by not informing the jury he was acquitted of charges stemming from the September 2011 incident. The People disagree the judgment should be reversed under *People v. Watson*, *supra*, 46 Cal.2d 818 or *Chapman v. California* (1967) 386 U.S. 18 because the court's evidentiary ruling was not of constitutional magnitude and it is not reasonably probable that defendant would have received a more favorable verdict had the jurors been informed of the prior acquittal.

A. Pretrial Proceedings

The prosecutor filed a motion in limine requesting that evidence of the September 2011 incident involving Latoia and Latasha be admitted pursuant to Evidence Code section 1101, subdivision (b). Defendant objected on double jeopardy grounds to admitting the prior incident because he had already been tried and acquitted of those charges. The prosecutor also asked that the court prohibit defendant from presenting evidence of his acquittal on charges based on the September incident. Defendant objected to both motions as untimely but he declined the court's offer of additional time

[4] *People v. Griffin* (1967) 66 Cal.2d 459.

to prepare a response. The court then granted the prosecution's request to admit evidence from the September incident.

The trial court reasoned that defendant's acquittal under the reasonable doubt standard was irrelevant and inadmissible because the current jury was to apply a preponderance of the evidence standard in evaluating the prior uncharged act under Evidence Code section 1101, subdivision (b). Defendant responded, "Basically, they're the same thing. [¶] . . . [¶] . . . I'm not being tried for the acquittal , but [the prosecutor's] bringing in instances that I've been acquitted of for certain stuff back in there." The trial court granted the prosecutor's motion to exclude the acquittal and gave the jury the standard limiting instructions for the prior act evidence. (CALCRIM No. 303 [Limited Purpose Evidence in General] and CALCRIM No. 375 [Evidence of Uncharged Offense to Prove Intent, etc.].)

B. Griffin and Mullens

In *People v. Griffin, supra*, 66 Cal.2d 459, a capital case, the prosecution's murder theory was that the defendant caused fatal injuries to the victim during a rape. (*Id.* at pp. 461-463.) The *Griffin* court held an attempted rape in Mexico was admissible to prove intent and lack of accident in the charged murder. (*Id.* at pp. 464-465.) However, Griffin could present proof of his acquittal "to weaken and rebut the prosecution's evidence of the other crime." (*Id.* at p. 465.) The court explained: "[S]ome courts have concluded that an acquittal so attenuates the weight that may properly be given evidence of another crime as to require the exclusion of such evidence altogether. [Citations.] Our rule does not go that far, but instead is fair to both the prosecution and the defense by assisting the

jury in its assessment of the significance of the evidence of another crime with the knowledge that at another time and place a duly constituted tribunal charged with the very issue of determining defendant's guilt or innocence of the other crime concluded that he was not guilty." (*Id.* at p. 466 [fn. omitted].)

In *People v. Mullens* (2004) 119 Cal.App.4th 648, 666, the defendant was originally charged with sexual offenses against two children. (*Id.* at p. 652.) In his trial, a jury acquitted Mullens of the charged offense against one child and deadlocked as to the offenses against the second child. (*Ibid*.) In a retrial of the counts concerning the second child, the prosecutor introduced the other offense as propensity evidence under Evidence Code section 1108 and the trial court excluded evidence of the prior acquittal. (*Id*. at pp. 652-653.) The Court of Appeal held "Mullens's acquittal of the previously charged sex offense . . . was admissible as a matter of law" and the exclusion of that evidence was error. (*Id.* at p. 669.) The *Mullens* court also implicitly found the variances in the burdens of proof between the prior and current tribunals in evaluating the particular incident did not affect the admissibility of the prior acquittal. (See *Id.* at pp. 667-669.)

In light of *Griffin* and *Mullens*, the trial court here should not have excluded evidence of defendant's prior acquittal on relevancy grounds. However, the trial court's error does not warrant reversal of the judgment. The United States Supreme Court has recognized that a defendant's constitutional right to present a defense is not without limitation. The "[a]pplication of the ordinary rules of evidence" does not generally infringe on a defendant's constitutional right to present a defense. (*People v. Snow* (2003) 30 Cal.4th 43, 90.) A defendant's constitutional right to due process is not

infringed where the trial court only deprives him or her of "some" evidence concerning the theory of defense. (*People v. McNeal* (2009) 46 Cal.4th 1183, 1203; *People v. Humphrey* (1996) 13 Cal.4th 1073, 1089.)

Defendant was permitted to challenge the prior act evidence through his cross-examinations of Latoia and Latasha, who testified that Latoia had assaulted defendant with the electronic charger and that Latoia was not hospitalized or seriously injured. Additionally, defendant elicited exculpatory evidence that the injury on Latoia's knee was a rug burn, the photograph depicting a neck injury was not a photograph of Latasha, the beer bottle photographed by Officer Ricks was not broken and had no blood on it, the bottle was not tested for fingerprints, the bottle was randomly selected for photographing, and defendant had no visible injuries on his hands.

Since the trial court's exclusion of the prior acquittal only deprived defendant of "some" evidence in support of his defense, the ruling did not violate his due process right to present a defense. (*People v. McNeal, supra,* 46 Cal.4th at p. 1203; *People v. Humphrey, supra,* 13 Cal.4th at p. 1089.) Therefore, no constitutional violation occurred.

C. Harmless Error

Furthermore, the exclusion of defense evidence through a misapplication of the Evidence Code is reviewed for prejudice under the *Watson* harmless error test. (*People v. Cudjo* (1993) 6 Cal.4th 585, 611.) Specifically, *Griffin* and *Mullens* applied the *Watson* harmless error test to the erroneous exclusion of a prior acquittal of an uncharged offense admitted at trial. (*People v. Griffin, supra,* 66 Cal.2d at pp. 466-467; *People v. Mullens, supra,* 119 Cal.App.4th at p. 669.)

The consistency of Latoia, Latasha, and Shanija's statements to Officer Medina in February 2012 compared with their recantations and feigned loss of memory at trial in April 2012 clearly demonstrated the truth of their prior statements. All three witnesses told Medina that, during an argument with Latoia, defendant made threats and grabbed a knife. At trial, Latoia and Latasha denied everything and Shanija did not remember anything. Latoia and Latasha also were evasive about the September incident.

Here "the trial court merely rejected some evidence concerning a defense, and did not preclude defendant from presenting a defense, any error is one of state law and is properly reviewed under *People v. Watson* [citation]." (*People v. McNeal* (2009) 46 Cal.4th 1183, 1203.) The trial court only deprived defendant of one piece of evidence. In view of the witnesses' blatant failure to be truthful, it is not reasonably probable that defendant would have received a more favorable verdict if he had been permitted to present evidence of the previous acquittal.

V

OTHER-CRIMES EVIDENCE

In a related claim, defendant asserts the trial court prejudicially erred by allowing evidence of the September 2011 incident because the court did not weigh the evidence under Evidence Code section 352. Defendant also claims the admission of the other-crimes evidence violated his rights to due process and a fair trial because it constituted improper propensity evidence, requiring reversal of the judgment under *Chapman*.

We conclude defendant forfeited these issues by not objecting on those grounds in the trial court. Notwithstanding forfeiture, defendant cannot show the trial court abused its discretion in admitting the evidence. Furthermore, any alleged error was harmless.

A. Prosecution's Motion in Limine

The prosecutor asked the trial court to admit evidence of the September 2011 incident under Evidence Code section 1101, subdivision (b), to prove whether defendant intended his statements be understood and communicated as threats and whether those threats actually caused sustained fear in Latasha, the victim, as required for a section 422 conviction. The prosecutor argued that the victim's state of mind was a stronger reason than intent for admitting the other-crimes evidence, and that the September 2011 incident was not being admitted as propensity evidence. Defendant raised an objection based on double jeopardy. Defendant refused the court's offer of additional time to respond. The court told defendant he could raise his hearsay objections at the time the evidence was presented and granted the motion. (Evid. Code, § 1101, subd. (b).)

B. Forfeiture

The California Supreme Court has "consistently held that the 'defendant's failure to make a timely and specific objection' on the ground asserted on appeal makes that ground not cognizable" on appeal. (*People v. Seijas* (2005) 36 Cal.4th 291, 302, quoting *People v. Green* (1980) 27 Cal.3d 1, 22; Evid. Code, § 353.) A defendant who represents himself is subject to the same responsibilities as a lawyer and does not receive special consideration. (*People v. Redmond* (1969) 71 Cal.2d 745, 758; *Kobayashi v. Superior Court* (2009) 175 Cal.App.4th 536, 543.) We disagree with defendant's effort to argue

that he preserved the issue by objecting under Evidence Code section 1101, subdivision (b), citing *People v. Lopez* (2011) 198 Cal.App.4th 698, 712-716. In the trial court, defendant objected only on double jeopardy and hearsay grounds.

Defendant's failure to raise an Evidence Code section 352 objection in the trial court forfeits the issue for purposes of appeal. (*People v. Valdez* (2012) 55 Cal.4th 82, 138.) Specifically, a hearsay objection in the trial court does not preserve an Evidence Code section 352 claim for appeal. (See *People v. Escobar* (2000) 82 Cal.App.4th 1085, 1102-1103 & fn. 11; *People v. Virgil* (2011) 51 Cal.4th 1210, 1249.) Also, in the absence of an objection under Evidence Code sections 352 or 1101, subdivision (b), the failure to raise a due process objection in the trial court forfeits such a constitutional challenge to the evidence on appeal. (*People v. Champion* (1995) 9 Cal.4th 879, 918; *People v. Catlin* (2001) 26 Cal.4th 81, 122-123.) An appellate claim that improper character evidence was admitted also must be preserved by asserting an objection in the trial court. (*People v. McKinnon* (2011) 52 Cal.4th 610, 674.)

C. Admissibility of the Other-Crimes Evidence

We review the trial court's determination of the admissibility of other-crimes evidence for an abuse of discretion. (*People v. Benavides* (2005) 35 Cal.4th 69, 90; *People v. Lenart* (2004) 32 Cal.4th 1107, 1123.) A trial court abuses its discretion when it rules in an "arbitrary, capricious, or patently absurd manner." (*People v. Rodriguez* (1999) 20 Cal.4th 1, 9-10.)

Defendant cannot show an abuse of discretion here. Evidence Code section 1101, subdivision (b), specifically provides for the admission of other-crimes evidence when it

is "relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident, . . .) other than [the person's] disposition to commit such an act." Evidence which tends logically, naturally, and by reasonable inference to establish material facts such as identity, intent, or motive is relevant. (*People v. Champion, supra*, 9 Cal.4th at p. 922.) "The admissibility of such evidence turns largely on the question whether the uncharged acts are sufficiently similar to the charged offenses to support a reasonable inference of the material fact they are offered to prove." (*People v. Erving* (1998) 63 Cal.App.4th 652, 659-660, citing *People v. Ewoldt* (1994) 7 Cal.4th 380, 393.) The charged and uncharged offenses do not have to be identical—only sufficiently similar. (*Ewoldt*, at p. 402; *Erving*, at pp. 659-660, citing *Ewoldt*, at p. 393.) The least degree of similarity is required to prove intent, a greater degree of similarity is required to prove the existence of a common design or plan, and the greatest degree of similarity is required to prove identity. (*Ewoldt*, at pp. 402-403.) Here, the other-crimes evidence was admissible to show defendant's intent and gravity of purpose as well as the victim's state of mind. (Evid. Code, § 1101, subd (b).)

A violation of section 422 consists of five elements: (1) the defendant willfully threatened to commit a crime resulting in death or great bodily injury to another person; (2) the defendant specifically intended the threat be taken as a threat; (3) the threat was "unequivocal, unconditional, immediate, and specific as to convey . . . a gravity of purpose and an immediate prospect of execution of the threat;" (4) the threat actually caused the person threatened "'to be in sustained fear for her own safety or for her

immediate family's safety,'" and (5) "the threatened person's fear was 'reasonabl[e]' under the circumstances." (*People v. Toledo* (2001) 26 Cal.4th 221, 227-228, citing § 422, and citing *People v. Bolin* (1998) 18 Cal.4th 297, 337-340 & fn. 13.)

In the September 2011 incident, defendant threatened and injured both sisters at the same location as in February 2012. In both incidents, defendant brandished a weapon—a beer bottle and a knife. Therefore, the first incident was highly probative of defendant's intent in uttering threats against Latasha five months later and of Latasha's state of mind and whether her fear was reasonable under the circumstances. The two incidents were not identical but they were sufficiently similar for purposes of admitting the September 2011 incident under the intent and state of mind exceptions of Evidence Code section 1101, subdivision (b).

D. Evidence Code Section 352

The trial court's weighing of evidence under Evidence Code section 352 is reviewed for abuse of discretion. (*People v. Scheid* (1997) 16 Cal.4th 1, 13.) The trial court's ruling should not be overruled absent "'a manifest abuse of that discretion resulting in a miscarriage of justice.'" (*People v. Cain* (1995) 10 Cal.4th 1, 33, quoting *People v. Milner* (1988) 45 Cal.3d 227, 239.) The probative value of the other-crimes evidence was not substantially outweighed by the risk of undue prejudice, consumption of time or confusion of the issues.

As discussed above, the September 2011 incident was highly probative of the elements which the prosecution had to prove. In contrast, there was no risk of undue prejudice. The threats uttered during the February 2012 incident were more serious

because defendant also threatened Shanija and Latasha's unborn child. The September 2011 incident was not inflammatory when compared to the charged offense. Additionally, the testimony about the prior act was relatively brief, not creating an undue consumption of time or confusion of the issues. Evidence Code section 352 did not bar its admission.

E. Violation of Due Process

As shown above, evidence of the September 2011 incident was properly admitted to show defendant's intent and the victim's state of mind. (Evid. Code, § 1101, subd. (b).) Therefore, the evidence did not violate defendant's due process rights. (*People v. Foster* (2010) 50 Cal.4th 1301, 1335; *People v. Arauz* (2012) 210 Cal.App.4th 1394, 1402-1403.)

To the extent defendant argues his federal due process rights were violated because the September 2011 incident constituted propensity evidence, his argument must also be rejected. The United States Supreme Court has never held propensity evidence violates due process. (*Alberni v. McDaniel* (9th Cir. 2006) 458 F.3d 860, 863-864.) The United States Supreme Court has expressly declined to rule upon the question. (See *Estelle v. McGuire* (1991) 502 U.S. 62, 75, fn. 5.) Because the prior act evidence here was relevant, the evidence was not unfair and did not violate fundamental concepts of justice and due process. (*McKinney v. Rees* (9th Cir. 1993) 993 F.2d 1378, 1384-1385, citing *Dowling v. United States* (1990) 493 U.S. 342, 352.)

F. Harmless Error

Notwithstanding defendant's various contentions, the admission of the prior act evidence was harmless unless it is reasonably probable that defendant would have received a more favorable outcome in the absence of the alleged error. (*People v. Welch* (1999) 20 Cal.4th 701, 749-750, citing *People v. Watson*, *supra*, 46 Cal.2d at p. 836.)[5] Under *Watson*, any alleged error in admitting evidence of the September 2011 incident was harmless. The evidence was relevant and probative, causing no risk of undue prejudice, consumption of time or confusion of the issues. It is not reasonably probable that a section 352 weighing of the evidence—as requested by defendant for the first time on appeal—would have resulted in its exclusion. Furthermore, the jurors were specifically instructed that they could not use the other-crimes evidence to conclude "that the defendant has a bad character or is disposed to commit crime," and admonished that the evidence could only be considered for the limited purposes of proving intent and state of mind, and that any finding that defendant committed the uncharged offenses was "only one factor to consider along with all the other evidence," and was "not sufficient by itself to prove that the defendant is guilty of criminal threats." (*People v. Sanchez* (2001) 26 Cal.4th 834, 852.)

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[5] The California Supreme Court in *People v. Malone* (1988) 47 Cal.3d 1, 22, rejected defendant's argument that the error in admitting other-crimes evidence should be reviewed under the *Chapman* reasonable doubt standard.

VI

THE JURY QUESTIONS

The jury deliberated one afternoon and one morning. On the first day, the jury submitted three notes. At 2:08 p.m. the jury asked for a copy of the police report. The court correctly responded the report was not in evidence. At 2:37 p.m., the jury asked the court to explain the meaning of "sustained fear for a period of time?" The court conferred with defendant and discussed that the instruction was based on *People v. Solis* (2001) 90 Cal.App.4th 1002, 1024. The court then responded to the jury: "Sustained fear is any period of time beyond that which is not momentary, fleeting, or transitory. It does not require a long lasting period of fear. A sustained fear is for the jury to decide." At 3:28 p.m., the jury requested a read-back of the testimony of Officer Medina. The testimony was read to the jury the next morning between 10:16 a.m. and 10:37 a.m. Defendant did not waive his rights to discuss the first and third notes or to be present during the read-back. The jury reached a verdict at 11:13 a.m. on the second day.

Defendant maintains the trial court violated sections 977, 1043 and 1138, and Article I, section 15, of the California Constitution by not giving him notice of the first and third jury questions and by responding to those questions without consulting him, mandating reversal under the *Watson* standard. Defendant also contends his right to be present at all critical stages of the proceedings and his right to counsel under the federal Constitution were violated and the judgment must be reversed under *Chapman* or is reversible per se.

The People agree the trial court erred by not notifying defendant of the first and third jury questions and by responding to the jury without a waiver from defendant. The error, however, was purely one of state law, which is harmless in light of the ministerial matters addressed by the questions.

Under sections 977, subdivision (b)(1), 1138, and 1043, defendant should have been present to consider all the jury questions. The statutes apply whenever a jury during deliberations requests to reexamine any evidence that has been introduced at trial or poses any question to the court that may affect the jury's consideration or resolution of the case. (*People v. Garcia* (2005) 36 Cal.4th 777, 801.) Section 1138 has been interpreted "not only to require that the defendant and counsel be given notice of the jury's inquiry, but also to afford the defense the right, once so notified, to be present and to have an opportunity to have meaningful input in the court's response to the jury's inquiry. [Citations.]" (*Garcia*, at pp. 801-802.) The trial court's failure to notify the parties of the jury questions constituted state law or statutory error. (*People v. Avila* (2006) 38 Cal.4th 491, 598.)

On the other hand, no constitutional rights are impacted by these particular violations of state law. Defendant's personal presence was not necessary for an "'opportunity for effective cross-examination'" or to "'contribute to the fairness of the procedure'" for either jury question. (*People v. Waidla* (2000) 22 Cal.4th 690, 741-742, quoting *Kentucky v. Stincer* (1987) 482 U.S. 730, 744-745, fn. 17.) It is well-established that police reports are generally inadmissible as hearsay. (*People v. Adair* (2003) 29 Cal.4th 895, 905; *People v. Roberts* (2011) 195 Cal.App.4th 1106, 1114, fn. 3.) The

police report in defendant's case was not admitted into evidence at trial. The trial court's response to the first jury question was entirely proper and defendant's presence would have had no impact on the fairness of the procedure.

As to the third jury request for a readback of Officer Medina's testimony regarding his conversations with Latoia, Latasha and Shanija on February 12, 2012, no new evidence was being presented and defendant was not deprived of his right of cross-examination. Defendant's presence would not have contributed to the fairness of the procedure. The jury was entitled to the requested readback and defendant's due process rights were not infringed by the trial court granting that request in his absence. The jury inquiries did not constitute critical stages of the proceedings within the meaning of the Sixth or Fourteenth Amendments. The error was purely one of state law.

Finally any such error was harmless. (*People v. Avila, supra*, 38 Cal.4th at p. 598 [§ 977, subd. (b)(1)]; *People v. Garcia, supra*, 36 Cal.4th at p. 807 [§ 1138].) Defendant could not have suffered any prejudice since the police report was clearly inadmissible. Defendant's speculations about possible imperfections in the readback do not establish prejudice. "Prejudice under *Watson* 'must necessarily be based upon reasonable probabilities rather than upon mere possibilities.'" (*People v. Mena* (2012) 54 Cal.4th 146, 162.) It would have been improper for defendant to attempt to influence the deliberations by adding to the testimony requested by the jurors.

The record shows the jury was satisfied with the trial court's responses to its inquiries, specifically the readback request. There were no more notes from the jury and the jury quickly reached its verdict. Any error was harmless.

VII

CUMULATIVE ERROR

Multiple trial errors may have a cumulative effect that in a closely balanced case may warrant reversal of the judgment where it is reasonably probable that it affected the verdict. (*People v. Hill* (1998) 17 Cal.4th 800, 844-848; *People v. Holt* (1984) 37 Cal.3d 436, 458-459; *People v. Wagner* (1975) 13 Cal.3d 612, 621.) However, if the reviewing court rejects all of a defendant's claims of error, it should reject the contention of cumulative error as well. (*People v. Anderson* (2001) 25 Cal.4th 543, 606.) As we have discussed, any error in this case was harmless or inconsequential. "'[A] defendant is entitled to a fair trial, but not a perfect one,' for there are no perfect trials. [Citations.]" (*Brown v. United States* (1973) 411 U.S. 223, 231-232.) Accordingly, there should be no finding of cumulative error. (See, e.g., *People v. Koontz* (2002) 27 Cal.4th 1041, 1094 [no cumulative error where single nonprejudicial instructional error in guilt phase].) No egregious conduct occurred in this case compared to what transpired in *Hill, supra*.

Defendant does not articulate or explain how any particular combination of errors had a "synergistic effect" with each other or on the judgment. Instead, defendant summarily argues that his conviction should be vacated and the matter remanded for a new trial after alleging a "paucity" in the prosecutor's evidence. An appellate court need not consider points unsupported by argument. (*People v. Stanley* (1995) 10 Cal.4th 764, 793.) We summarily reject defendant's cumulative error claim.

VIII

DISPOSITION

Absent prejudicial error and cumulative error, we affirm the judgment.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

CODRINGTON
J.

We concur:

HOLLENHORST
Acting P. J.

KING
J.